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Brief of Hancock for D. C

Filed Jan. 24, 1898.

IN THE

SUPREME COURT

OF THE

UNITED STATES,

OCTOBER TERM, 1897.

No. 221.

THE PEOPLE OF THE STATE OF NEW YORK, EX REL. PARKE, DAVIS & CO.,
Plaintiffs in Error,

against

JAMES A. ROBERTS, *Comptroller of the State of New York,*
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

T. E. HANCOCK,
Attorney-General, State of New York,
Counsel for Defendant in Error, Capitol, Albany, N. Y.

ALBANY:
THE BRANDOW PRINTING CO., PRINTERS.
1897.

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THE PEOPLE OF THE STATE OF NEW YORK, EX REL. PARKE, DAVIS & COMPANY, PLAINTIFFS IN ERROR, *agst.* JAMES A. ROBERTS, COMPTROLLER OF THE STATE OF NEW YORK, DEFENDANT IN ERROR.	No. 221.

Brief of Attorney-General, State of New York, on behalf of defendant in error, James A. Roberts, Comptroller of the State of New York.

STATEMENT.

This case is brought into the Supreme Court of the United States for the purpose of reviewing the decision and determination of the Comptroller of the State of New York, in imposing a corporation tax upon the plaintiff in error, in accordance with the laws of that State,

and the decision of the State courts in affirming the determination of the Comptroller.

The Comptroller imposed a tax upon the corporation, and settled an account therefor, including penalty, in the sum of $1,386, for the six years ending November 1, 1894. The tax was at first fixed at $1,540. (Pages 9 and 10.) Upon a rehearing had upon application of the corporation, the amount of the tax was reduced to the sum first above stated. The Comptroller appraised the amount of the corporation's capital employed in this State during the years in question at the sum of $90,000. (Pages 4 and 25.)

The plaintiff in error is a corporation organized pursuant to the Laws of the State of Michigan, employing a large portion of its capital and doing business in New York (pages 9 and 10), but failed and refused to make any report to the Comptroller in accordance with the provisions of section 1 of the Corporation Tax Law; whereupon an examination was had before a commissioner, in accordance with the provisions of section 13; and a rehearing was had before the Comptroller upon application of the corporation in accordance with the provisions of section 19 of said law.

From the evidence it appears that the corporation had an office and place of business at 92 Maiden Lane, New York city (page 22), paying an annual rental of $12,500, employing a force of over fifty people, and paying the general manager of the company's business in New York a salary of $8,000 per annum; running the New York, branch at an average yearly expense of from $102,000 to $172,000, for the years 1890 to 1894, inclusive. The valuation of the property owned by the corporation in

this State, in the line of desks, safes, furniture, etc., is stated at $15,000 (page 22); the average stock of goods sent from Michigan and carried in New York was $50,000 (pages 12 and 20); the average bank balance appears to be $10,000. Also during those years it employed a continuing capital used in purchasing and selling in the open market in New York crude drugs, amounting to from $23,000 to $62,000 per year. (Page 21.) Goods were also imported from Europe. The manager of the corporation, in his examination before the commissioner, made the following statement of business done in New York city and also in the country. (Page 17.)

Sales: City, 1890, $259,925 85; 1891, $316,561.84; 1892, $330,860.38; 1893, $355,402.62; 1894, $358,417.97.

Country, $225,089.74, $248,076.01, $278,190.23, $263,892 03, $294,004.01.

Total, $482,915.57, $564,637.85, $607,050.61, $619,-094.85, $652,421.98.

City account (same years), annual net expenses, $86,810.79, $110,608.73, $133,785.03, $131,625.51, $147,-171.99.

Inventory, $79,288.67, $76,841.84, $101,155.78, $91,-629.77, $108,478.04.

Objections raised before the Comptroller and in the State courts.

The objection specified by plaintiffs in error to the payment of a corporation tax may be summarized as follows:

1. That the corporation is engaged in manufacturing, and, therefore, exempted from the payment of a corporation tax.

An examination of the statute itself very clearly indicates that there is nothing to this objection. The exemption clause in section 3 of the act provides "except * * * manufacturing or mining corporations or companies wholly engaged in carrying on manufacturing or mining ores within this State." * * *

The meaning of the language quoted has been construed by the State courts. It is to be noted that the exemption pertains to corporations or companies wholly engaged in carrying on manufacturing or mining ores *within this State.*

In the case of People ex rel. Tiffany & Co. v. Campbell, 144 N. Y. 166, the court says, at page 171:

"We do not assent to the claim of the relator's counsel that the words '*wholly engaged in*,' contained in the amendment of 1889, do not apply to manufacturing corporations. The plain object of the exemption of manufacturing corporations carrying on manufacture *within this State*, from taxation, by the act of 1880, was the encouragement of production, and it was assumed that the employment of capital and labor in the business of manufacturing here was a just ground for the exemption. The object of the amendment of 1889 was not to withdraw the protection given by the act of 1880, but to define more specifically than in the prior act, the purpose that the exemption should be confined to corporations whose corporate business was exclusively that of manufacture."

The statutory intent is very thoroughly considered in the case of People ex rel. Blackinton Co. v. Roberts, 4 Appellate Division, 388, where it appears that a domestic corporation was engaged in manufacturing in another State, and where the court discussed and reviewed the

authorities bearing upon not only the letter but intent of the statute, holding that the exemption clause applied to corporations wholly engaged in manufacturing in the State of New York, and that the reason of the exemption is the desire on the part of the State to bring within its borders the advantages which attend the maintaining of large establishments in the employment of many men therein. This decision (People ex rel. Blackinton Co. v. Roberts) was affirmed in 151 N. Y. 652.

The plaintiff in error was not wholly engaged in manufacturing in the State of New York, and in fact did no manufacturing business in that State, and it appears unnecessary to multiply authorities, even if that question were before the Supreme Court of the United States.

People ex rel. W. E. Co. v. Campbell, 145 N. Y. 587.
People ex rel. T. & Co. v. Campbell, 144 N. Y. 166.
People ex rel. S. T. C. Co. v. Wemple, 133 N. Y. 323.

Furthermore, the burden was clearly upon the plaintiff in error to establish its exemption from taxation.

Ford v. Delta & Pine Land Co., 164 U. S. 662.
C. B. Co. v. City of New Orleans, 99 U. S. 97.
People ex rel. T. & Co. v. Campbell, 144 N. Y. 166.
Knapp v. O'Neil, 46 Hun, 317-318.
Sherrill v. Hewitt, 36 N. Y. St. Repr. 321.
Butler v. City of Oswego, 56 Hun, 358.

2. It was further contended by the corporation that it was not doing business in the State of New York, or

exercising any corporate franchises therein, the corporation claiming that Mr. John Clay, the manager and agent of the corporation, was engaged in transacting business in the State of New York, and not the company itself.

This contention of the plaintiff in error appears to be so thoroughly controverted by the evidence that it seems unnecessary to comment upon it at all in this court. It is sufficient to say that Mr. Clay was to all intents and purposes the agent of the company. He was paid a salary for his services; he accounted to the company for the sales made at or through the New York office; the rents, taxes, repairs, salaries and all the expenses connected with the business were paid by the corporation, and the profits of the business went to Parke, Davis & Co.

3. It was further urged that the tax imposed by the Comptroller was too large. The amount of capital employed in this State, exclusive of goods imported from Europe, was at least $90,000 per annum.

It has been repeatedly held by the courts of the State of New York that the estimate of the Comptroller in determining the *amount of capital* employed in the State will not be interfered with, unless it is clearly established that the same was erroneous.

People ex rel. A. C. & D. Co. v. Wemple, 129 N. Y. 558.
People ex rel. S. C. O. Co. v. Wemple, 131 N. Y. 64.
People ex rel. P. R. R. Co. v. Wemple, 138 N. Y. 1.
People ex rel. Singer Mfg. Co. v. Wemple, 150 N. Y. 46.

4. There were also certain general allegations to the effect that the Tax Law is unconstitutional. At page 18, it is stated as an objection: "If the act be construed as imposing a liability on the ground that this corporation is not wholly engaged in manufacturing in the State of New York, it is clearly unconstitutional as a discriminating tax." At page 11: "If the construction of the act which had been intimated in certain *dicta* of the Court of Appeals, be that manufacturing corporations wholly engaged in manufacturing in this State are exempt, but that manufacturing corporations in other States and only partially here, or not at all, are not exempt, then the act is plainly unconstitutional." In the petition for a writ of *certiorari*, at page 5, it is declared: "That if the statute be correctly interpreted by the Comptroller as not exempting said corporation from taxation thereunder, then said statute is unconstitutional and void, and as in contravention of the Constitution of the United States and the amendments thereof."

None of these general claims or charges that the statute is unconstitutional, either *per se* or as applied to the facts of this particular case, appear to have been urged before the Comptroller or to have been considered by that official or the courts of the State of New York, except the charge of discrimination.

Article IV, Section 2, Constitution.

It may be very seriously doubted whether any other constitutional question is before the Supreme Court of the United States for review.

A constitutional objection taken in the State court can not be noticed in the Supreme Court on a writ of error

unless it is sufficiently specific, and a mere general objection of no constitutionality is not sufficiently specific.

Messenger v. Mason, 10 Wall. 507.
Maxwell v. Newbold, 18 How. (U. S.) 511.

Moreover, under the practice in the State of New York, the facts alleged in the petition upon which the writ of *certiorari* is issued form no part of the record for examination by the appellate court. The return to the writ contains all of the record which is considered in determining whether, or not, the judgment sought to be reviewed is proper; and the return of the Comptroller to this writ of *certiorari* shows, that the questions of constitutionality now sought to be raised were not considered by him; neither were they passed upon or presented to the Appellate Division or the Court of Appeals, except as before stated.

They are first squarely presented for the consideration of any court by the petition for a writ of error; but that is no part of the record before this court.

Warfield v. Chaffee, 91 U. S. 690.

It is not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown on the record that it did arise and was applied by the State court to the case.

Hager v. California, 154 U. S. 639.
Crowell v. Randall, 10 Peters, 368.
Edwards v. Elliot, 21 Wall. 532.
Ocean Ins. Co. v. Polleys, 13 Pet. 157.
Walker v. Villavaso, 6 Wall. 124.
Rector v. Ashley, 6 Wall. 142.
Gibson v. Chouteau, 8 Wall. 314.
Phœnix Ins. Co. v. Treasurer, 11 Wall. 204.
Otis v. Oregon S. S. Co., 116 U. S. 548.

5. It is to be remembered that under the practice in the State of New York the return of the Comptroller (this being made in answer to a writ of *certiorari*) is conclusive as to the facts.

People ex rel. Edison Co. v. Campbell, 88 Hun, 530.
People ex rel. Miller v. Wurster, 149 N. Y. 549.
People ex rel. Anderson v. Hoag, 42 N. Y. Supp. 886.

The return of the Comptroller must be taken as conclusive.

People ex rel. Sims v. Fire Comm., 73 N. Y. 437.
People ex rel. Roebling's Sons v. Wemple, 138 N. Y. 582.
People ex rel. Press Pub. Co. v. Martin, 142 N. Y. 228.

It appears from the return (page 10) that "the relator, "during the years in question, was employing a large "amount of its capital within this State, and was not "wholly engaged in manufacture within this State, and "the tax so levied against it by the Comptroller was and "is valid in all respects, and the relator is liable to pay "the same as and for capital employed by it within this "State; that the relator was engaged in the sale of goods "not manufactured by it within this State, and large "sales were made of large quantities of goods annually. "Business was carried on in this State by the relator, and "it empl yed its capital in such manner as to render it "liable to taxation in this State."

Provisions of the Corporation Tax Laws of the State of New York.

The law in force at the time this tax was imposed appears in full, sections 1 to 20, in Banks and Brothers' 9th Edition, Revised Statutes, State of New York, Vol. 3, pages 2493 to 2505. (Laws 1880, chap. 542; amended, Laws 1881, chap 361; Laws 1882, chap. 151; Laws 1885, chaps. 359 and 501; Laws 1889, chaps. 193, 353 and 463, and Laws 1890, chap. 522; Laws 1894, chap. 592.)

Section 1 of the Corporation Tax Law makes it the duty of the president or treasurer of every corporation liable to be taxed *on its corporate franchises or business*, to make a report in writing to the Comptroller annually, on or before the 15th day of November, stating the amount of capital paid in, the date, amount and rate per centum of dividends declared. In case no dividends are declared, or the same are less than six per centum upon the par value of the stock, a sworn appraisal of the actual value of the stock is to be forwarded to the Comptroller, who, however, if not satisfied with the valuation returned, is authorized to make his own valuation, and to settle an account upon the valuation so made by him.

Section 2 of the act provides that in case of a failure to make the report required by the statute, or to pay the tax imposed by the Comptroller, it shall be his duty to add a ten per centum penalty to the tax of said corporation.

Section 3 of the act reads as follows: "Every corporation, joint stock company, or association whatever, "now or hereafter incorporated, organized, or formed "under, by, or pursuant to law in this State, or

"in any other State or country, and doing busi-
"ness in this State, except only savings banks and insti-
"tutions for savings, life insurance companies, banks, for-
"eign insurance companies, manufacturing or mining
"companies, or companies wholly engaged in carrying on
"manufacturing, or mining ores within this State, and
"agricultural and horticultural societies, associations or
"corporations, which exceptions, however, shall not in-
"clude gas companies, trust companies, electric and steam
"heating, lighting and power companies, shall be liable
"to and shall pay a tax, as a tax upon its franchise or
"business, into the State treasury annually, to be com-
"puted as follows: If the dividend, or dividends, made or
"declared by such corporation, joint-stock company or
"association, during any year ending with the first day
"of November, amount to six or more than six per centum
"upon the par value of its capital stock, then the tax to
"be at the rate of one-quarter mill upon the capital stock
"for each one per centum of dividends so made or de-
"clared; or, if no dividend be made or declared, or if the
"dividend or dividends made or declared do not amount
"to six per centum upon the par value of said capital
"stock, then the tax to be at the rate of one and one-half
"mills upon each dollar of the valuation of the said
"capital stock, made in accordance with the provisions
"of the first section of this act; and in case any such cor-
"poration, joint-stock company or association, shall have
"more than one kind of capital stock, as, for instance,
"common and preferred stock, and upon one of said stocks
"a dividend or dividends amounting to six or more than
"six per centum upon the par value thereof has been

made or declared, and upon the other no dividend has "been made or declared, or the dividend or dividends "made or declared thereon amount to less than "six per centum upon the par value thereof, then "the tax shall be at the rate of one-quarter mill for "each one per centum of dividends made or declared "upon the capital stock upon the par value of which the "dividend or dividends made or declared amount to six "or more than six per centum, and in addition thereto "tax shall be charged at the rate of one and one-half "mills upon each dollar of a valuation, made also in ac- "cordance with the provisions of this act, of the capital "stock upon which no dividend was made or declared, "or upon the par value of which the dividend or divi "dends made or declared did not amount to six per "centum."

Section 11, as far as applicable, reads as follows:

"*The amount of capital stock* which shall be the basis "for tax under the provisions of section three of this act, "in the case of every corporation, joint-stock company "and association liable to taxation thereunder, shall be "the *amount of capital stock employed within this State.* "In making to the Comptroller the report in writing or "certificate of estimate and appraisal of the capital stock "of such corporation, joint stock company or association, "provided for by the first section of this act, it shall be "the duty of the president or treasurer thereof, as the "case may be, to state, specifically, the amount of capital "stock employed within this State of such corporation, "joint-stock company or association. Whenever the "Comptroller is dissatisfied with such report or certificate

"of estimate and appraisal, as the case may be, of any "corporation, joint stock company or association, whose "capital is only partially employed within this State, he "is authorized and empowered to ascertain, fix and de- "termine the *amount of capital* employed within this "State, and so settle an account for the taxes and pen- "alties due the State thereon."

Section 19 of the act authorizes the Comptroller to re-adjust the taxes imposed, upon application of the corporation.

Section 20 of the act provides for a review of the law and the facts as found by the Comptroller, by writ of *certiorari*.

POINTS.

I.

The tax, although upon the franchise or business of a corporation, is measured by the amount of capital employed in the State.

This appears clearly from the phraseology of the statute itself. (§ 3.) The statute was amended by chapter 501, Laws of 1885, so as to make it more favorable to corporations only doing a part of their business in the State of New York. Under the act of 1882 (chap. 151, § 11) it was left with the Comptroller to determine "the amount of capital stock which in his judgment shall be the basis of the tax." By the amendment the basis of the tax is "the amount of capital stock employed in this State."

The Corporation Tax Law of New York was very thoroughly reviewed in the case of Horn Silver Mining Company v. New York State, 143 U. S. 305. The views of the court are summarized in the head-note as follows: "The statute of New York of May 26, 1881 (Laws of "1881, chap. 361) imposing a tax upon the corporate "franchise or powers of every corporation, joint-stock "company or association incorporated or organized under "any law of the State or of any other State or country, "to be computed by a percentage upon its whole capital "stock, and to be ascertained in the manner provided by "the act, when applied to a manufacturing corporation "organized under the Laws of Utah, and doing the greater "part of its business out of the State of New York, and pay- "ing taxes in Illinois and Utah, but doing a small part "of its business in the State of New York, does not "tax persons or property not within the State; nor regu "late interstate commerce; nor take private property "without just compensation; nor deny to the corpora- "tion the equal protection of the laws; nor impose a tax "beyond the constitutional power of the State; and the "remedy of the corporation against hardship and in- "justice, if any has been suffered, must be sought in the "Legislature of the State."

After a discussion of the statute, the court concludes at the close of the opinion (p. 318): "The tax is not "levied upon articles imported, nor is there any impedi- "ment to their importation. The products of the mine "can be brought into the State and sold here without tax- "ation, and they can be exhibited there for sale in any "office or building obtained for that purpose; the tax is

"levied only upon the franchise or business of the Com-
"pany."

See also Home Ins. Co. v. New York,
119 U. S. 129.

The nature and purpose of the law is clearly defined in People ex rel. A. C. & D. Co. v. Wemple, 129 N. Y. 558. In the course of its opinion the court says: "As "to corporations created under the laws of this State, "the power to tax their franchises and business is un-"doubted and general; but as to corporations, which are "created under the laws of another State or country, juris-"diction for taxing purposes is gained from the business "which they do in this State and the tax is one upon that "business. Foreign corporations coming into this State, "for the purpose of doing some part of their corporate "business here, are placed under the obligation to bear "some portion of the general burden of taxation, in "return for the privileges and benefits enjoyed. The "words of this section, which we are considering, may be "said to be the recognition by the Legislature of the limi-"tation upon its powers, or upon the right to levy taxes, "with respect to foreign corporations. Taxation under "the act as to such is limited to those 'doing business in "this State' and the tax is assessed upon that business."

* * * * * * * *

The rule that taxation is measured by the amount of capital employed in this State has been repeatedly stated by the courts of the State of New York.

Thus, in the case of People ex rel. S. T. C. Co. v. Wemple, 133 N. Y. 323, the court says in the head-note: "The basis of taxation of a foreign corporation under "said act is the portion of its capital employed within the

"State; this is represented by the actual value of prop-
"erty, whether in money or goods, or other tangible
"things."

At page 328 O'Brien, Judge, says: "Only such part
"of it (the capital) was employed within this State as
"was represented by the actual value of property,
"whether in money, goods or other tangible things. It
"kept goods for sale here. It had money on deposit, and
"it may be other property. This, whatever its value, was
"the basis of taxation."

See also People ex rel. Roebling's Sons Company v. Wemple, 138 N. Y. 582

II.

The statute is not an infringement of the interstate commerce clause of the Federal Constitution.

"The Congress shall have power * * * 3, to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." (Art. 1, § 8.)

The tax is uniform, applying in the same degree and to the same extent to domestic and foreign corporations, except as to foreign corporations they must not only have capital employed in this State, but must be *doing business in this State.* (§ 3.)

People ex rel. A. C. & D. Co. v. Wemple, 129 N. Y. 558.

As to corporations whose capital is only partially employed in the State, the Comptroller is to determine the amount of capital employed in the State. (§ 11.)

Section 3 reads: "§ 3. Every corporation, joint-stock
"company, or association whatever, now or hereafter in-

"corporated, organized, or formed under, by, or pursuant "to law in this State, or in any other State or country, "and doing business in this State, * * * shall be lia- "ble to and shall pay a tax, as a tax upon its franchise or "business, into the State treasury annually."

Section 11 provides: "§ 11. The amount of capital stock "which shall be the basis for tax under the provisions of "section three of this act, in the case of every corpora- "tion, joint-stock company and association liable to taxa- "tion thereunder, shall be the amount of capital stock "employed within this State. * * * Whenever the "Comptroller is dissatisfied with such report or certificate "of estimate and appraisal, as the case may be, of any "corporation, joint-stock company or association, whose "capital is only partially employed within this State "he is authorized and empowered to ascertain, fix and "determine the amount of capital employed within this "State, and so settle an account for the taxes and penal- "ties due the State thereon."

A. The tax is in no sense a regulation of interstate commerce, and does not come within the principles of any of the decided cases relative to that constitutional provision.

It was held in the case of Woodruff v. Parham, 8 Wall. 123, that a uniform tax imposed by a State upon all sales made in it, whether made by a citizen of it or a citizen of some other State, or whether the goods sold are the produce of that State, or some other State, is valid.

The opinion in that case contains these words (p. 136): "Whether we look, then, to the terms of the clause of the "Constitution in question, or to its relation to the other "parts of that instrument, or to the history of its forma-

"tion and adoption, or to the comments of the eminent "men who took part in those transactions, we are forced "to the conclusion that no intention existed to prohibit, "by *this clause*, the right of one State to tax articles "brought into it from another. If we examine for a "moment the results of an opposite doctrine, we shall be "well satisfied with the wisdom of the Constitution as "thus construed The merchant of Chicago who buys "his goods in New York and sells at wholesale in the "original packages may have his millions employed in "trade for half a lifetime and escape all State, county "and city taxes; for all that he is worth is invested in "goods which he claims to be protected as imports from "New York. Neither the State nor the city which pro- "tects his life and property can make him contribute a "dollar to support its government, improve its thorough- "fares or educate its children. The merchant in a town "in Massachusetts, who deals only in wholesale, if he "purchases his goods in New York, is exempt from taxa- "tion. If his neighbor purchase in Boston, he must pay "all the taxes which Massachusetts levies with equal jus- "tice on the property of all its citizens. These cases are "merely mentioned as illustrations. But it is obvious "that if articles brought from one State into another are "exempt from taxation, * * * the grossest injus- "tice must prevail, and equality of public burdens in "all our large cities is impossible."

Woodruff v. Parham, 75 U. S. (8 Wall.) 136-7.

As hereinbefore stated the measure or basis of the tax is the amount of capital employed in the State of New

York, and this tax is imposed without any effort or attempt to interfere with interstate commerce.

As was stated by Chief Justice Fuller in the case of Postal Telegraph Company v. Adams, 155 U. S. 688-695;

"It is settled that where by way of duties laid on the "transportation of the subjects of interstate commerce, "or on the receipts derived therefrom, or on the occupa- "tion or business of carrying it on, a tax is levied by a "State on interstate commerce, such taxation amounts to "a regulation of such commerce, and can not be sustained. "But property in a State belonging to a corporation, "whether foreign or domestic, engaged in foreign or in- "terstate commerce, may be taxed, or a tax may be im- "posed on the corporation on account of its property "within a State, and may take the form of a tax for the "privilege of exercising its franchises within the State, "if the ascertainment of the amount is made dependent "in fact on the value of its property situated within the "State (the exaction, therefore, not being susceptible of "exceeding the sum which might be leviable directly "thereon), and if payment be not made a condition "precedent to the right to carry on the business, but its "enforcement left to the ordinary means devised for the "collection of taxes. The corporation is thus made to "bear its proper proportion of the burdens of the gov- "ernment under whose protection it conducts its opera- "tions, while interstate commerce is not in itself sub- "jected to restraint or impediment. As pointed out by "Mr. Justice Field, in Horn Silver Mining Company v. "New York, 143 U. S. 305, the right of a State "to tax the franchise or privilege of being a corporation,

"as personal property, has been repeatedly recognized by "this court, and this whether the corporation be a domestic, "or a foreign corporation doing business by its permission "within the State. But a State can not exclude from "its limits a corporation engaged in interstate or foreign "commerce, or a corporation in the employment of the "general government, either directly in terms or indi- "rectly by the imposition of inadmissible conditions. "Nevertheless the State may subject it to such property "taxation as only incidentally affects its occupation, as "all business, whether of individuals or corporations, is "affected by common governmental burdens. (Ashley v. "Ryan, 153 U. S. 436, and cases cited.")

B. This particular corporation is not, as a matter of fact, or within the constitutional meaning, engaged in interstate commerce. Although a manufacturing corporation under the laws of the State of Michigan, as far as the State of New York is concerned it is simply a business corporation doing a large business and employing capital in that State. It is, to all intents and purposes, a wholesale merchant doing business in New York city, and no more entitled to exemption than any other wholesale dealer in dry goods, groceries, drugs or what not, who imports goods from Europe, brings them into the New York market, or brings them there from other States, and sells as the customers present themselves. Its store is at 92-94 Maiden lane, rented for twelve thousand five hundred ($12,500) dollars per annum; average amount of stock on hand, fifty thousand ($50,000) dollars; average imported crude drugs, fifty thousand ($50,000) dollars; office furniture and fixtures, fifteen thousand ($15,000)

dollars; monthly bank balance, ten thousand ($10,000) dollars; expense account for year 1894, one hundred and seventy-five thousand ($175,000) dollars. (Pages 12 and 13.) It buys and sells crude drugs in the New York market averaging forty thousand dollars ($40,000) per annum. (Pages 15 and 21.) Its store is seventy four feet front, with fifty employes and a manager, hired at the rate of eight thousand ($8,000) dollars per year. (Page 88.) With the same reasons urged by the plaintiff in error, exemption from taxation, both under the General and Corporation Tax Law, might be claimed by all the wholesale dealers of the State. It is to be observed that the Comptroller carefully excluded from his computation all crude drugs imported from Europe. Although there could be no legal objection to imposing even a direct tax upon these importations after they had "become articles of internal trade, and for domestic use and consumption." (Brown v. Maryland, 12 Wheaton, 419–455.) As far as the property is concerned that was considered by the Comptroller for the purpose of determining the amount of capital employed in the State of New York, *it had its situs in New York and had become incorporated with the property of that State.* The business of this corporation is not strictly commerce, interstate or foreign.

Pembina Mining Co. v. Pennsylvania,
125 U. S. 181.
People ex rel. S. C. O. Co. v. Wemple,
131 N. Y. 64.

In the case of Southern Cotton Oil Co. v. Wemple, 44 Federal Reporter, 24, the company claimed to be a foreign manufacturing corporation, and that it delivered to

its purchasers the goods manufactured in the original unbroken packages. Wallace, J., in deciding the case, says (page 27):

"But a foreign corporation, which established a business domicile here, and brings its property within this "jurisdiction, and mingles it with the general mass of "commercial capital, is taxable here; and the power of "the State is ample to tax its property directly or to lay "a tax upon its privilege of doing business, whether "the property consists of funds deposited in bank or of "goods sent here from other States, not in transit merely, "but to remain here until used or sold. The principle of "the present statute is that such corporations shall contribute according to the value of their capital employed "within the State. It lays the tax upon the privilege, "and measures the amount by the amount of property "which is protected here Reasonably interpreted, the "statute means by doing business within this State "using this State as a business domicile for transacting "any substantial part, even though a comparatively small "part, of the business which the company is organized "to carry on, and in which its capital is embarked. "It would seem that a manufacturing company which "maintains an established location here, and an agent, "for the purpose of selling its products or facilitating "their sale, carries on a part of its ordinary business "here, and has a business domicile here; and if it keeps "funds here for maintaining its place of business, and to "enable it to carry on the operations of its agent, such a "foreign company would seem to be taxable under the "statute. Certainly it can not matter that the volume

"of business done is small, or that the location, instead "of being a warehouse or a shop, is an office or a "sample-room."

III.

The statute does not deny to the plaintiff in error equal protection of the laws, or deprive it of property without due process of law.

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

Constitution, art. 4, § 2.

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the "United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution, art. 14, § 1.

(Speaking of the law then in force):

A. The Corporation Tax Law of New York is uniform in its terms and does not discriminate against foreign corporations. As far as the exemption relates to manufacturing corporations, it may be stated as follows:

1. The company must be incorporated solely for manufacturing purposes.

2. To claim absolute exemption, it must not only be incorporated solely for the purpose of doing manufacturing (and the business incident thereto) but must also be wholly engaged in that business in the State of New York.

3. If incorporated solely for manufacturing in so far as it does a manufacturing business in New York, it

is exempt from taxation, and only liable to be taxed on the business done *ultra vires*.

4. A corporation, *whether domestic or foreign*, can not claim exemption because of doing a manufacturing business outside of the State of New York.

People ex rel. Blackinton Co. v. Roberts, Fourth Appellate Division, Supreme Court, 388.
S. C., 151 N. Y. 652.
People ex rel. Tiffany & Co. v. Campbell, 144 N. Y. 166.
People ex rel. W. E. Co. v. Campbell, 145 N. Y. 587.
Horn Silver Mining Co. v. New York State, 143 U. S. 305.
Southern Cotton Oil Co. v. Wemple, 44 Federal Reporter, 24.

I have no doubt that when the case presents itself of a foreign corporation wholly engaged in manufacturing in the State of New York that it will be held exempt from taxation.

The statute has now been so amended as to exempt manufacturing corporations to the extent of the capital employed in manufacturing in that State, and in the sale of the manufactured product. (Laws 1896, chap. 908, sec. 183.)

The court says in the Blackington case: "The relator "in the case is a domestic corporation, organized for the "purpose of manufacturing woolens or textile fabrics. It "manufactures all its products at Blackington, in the State "of Massachusetts. * * * The relator's general "office, its sales, its bank account and the general "control and management of its business, are all "carried on in this State, but its manufacturing plant, "its employees in the business of manufacturing its

"goods, the work which they perform and the wages "paid to them are neither of them located or carried on "within this State. In other words, a large part of the "business is carried on within this State, but the entire "business of manufacturing its products is carried on in "another State. Within the literal reading of this sec- "tion it is clear that the relator is not exempt from the "franchise tax. Is it not engaged in carrying on manufac- "turing within this State? * * * It (the exemption) "is not given to all manufacturing corporations, nor even "to those who are engaged in carrying on business within "this State. But the manufacturing corporation must "also be engaged in carrying on manufacture within this "State."

People ex rel. Blackington v. Roberts, 4 App. Div. 388.

B. A State may discriminate in favor of domestic as against foreign corporations, and may require a franchise or business tax from the latter as a condition of being allowed to do business within this State.

Ducat v. Chicago, 10 Wall. 410.
Cooper Mfg. Co. v. Firguson et al., 113 U. S. 727.
Horn Silver Mining Co. v. New York, 143 U. S. 305.
Paul v. Virginia, 8 Wall. 168.
People v. Fire Ins. Co., 92 N. Y. 311.
Pembina Mining Co. v. Penn., 125 U. S. 189.
People v. Formosa, 131 N. Y. 478.
Demerest v. Flack, 128 N. Y. 205.
People v. Imlay, 20 Barb. 68.
Pembina Mining Co. v. Penn., 125 U. S. 181.
Paul v. Virginia, 75 U. S. (8 Wall.) 168.
Ashley v. Ryan, 153 U. S. 437.
Lafayette Ins. Co. v. French, 18 How. (U. S.) 404.

IV.

For the reasons hereinbefore suggested, and because the Supreme Court of the United States has already held that the Tax Law under consideration in no way contravenes the Constitution of the United States, the judgment of the State courts should be affirmed, and the plaintiffs' writ of error dismissed.

The Comptroller in determining the amount of capital employed in the State of New York, and imposing a tax, followed a well-established rule, which has received the sanction and approval of the courts of that State.

Our courts have repeatedly held that products manufactured in another state and sold in New York can properly be considered in estimating the amount of capital employed within that State.

People ex rel. S. C. O. Co. v. Wemple, 131 N. Y. 64.
People ex rel. Roebling Sons Co. v. Wemple, 138 N. Y. 582.
Southern Cotton Oil Co. v. Wemple, 44 Fed. Rep. 24.
People ex rel. S. T. C. Co., 133 N. Y. 323.

The Comptroller in determining the amount of capital employed in this State, had a right to take into consideration the bank account; the amount of moneys paid out; the actual value of its property, whether in money, goods kept for sale, or other tangible things; rentals, salaries or whatever might aid him in determining the amount of capital used by the corporation in the State.

People ex rel. R. S. Company v. Wemple, 138 N. Y. 582.

People ex rel. S. T. C. Co. v. Wemple, 133 N. Y. 323.
People ex rel. S. C. O. Co. v. Wemple, 131 N. Y. 64.
People ex rel. A. C. & D. Co. v. Wemple, 129 N. Y. 558.
People ex rel. U. T. Co. v. Coleman, 126 N. Y. 433.
People ex rel. U. V. C. Co. v. Roberts, 149 N. Y. 61.

It is manifest that no injustice has been done the plaintiff in error, either as to the amount or basis of the tax.

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